# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

**CWP No.1553/2002**

**Decided on.26.6.2002**

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**Reliance Telecom Ltd.** **…Petitioner.**

**Versus**

**H.P. State Environment Protection and Pollution Control Board.**

**…Respondents**

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*Coram*

**The Hon'ble Mr. Rajiv Sharma, J.**

*Whether approved for reporting ?*[1]*.yes*

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| **For the petitioner :** | **Mr. B.C. Negi, Advocate.** |
| **For the respondents** | **Mr. A.K. Bansal, Advocate for respondent No.1** |
| | **Mr. M.S. Chandel, Advocate General and Mr. M.A. Khan, Dy. Advocate General for respondent No. 2.** |

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**Rajiv Sharma, J.**

The brief facts which are necessary for the adjudication of this petition are that the respondent-Board has sent a communication to the petitioner-company on 21st May, 1999 seeking the following information:

i) **"Approved Project Reports**
ii) **Site/Location Plan**
iii) **Building Plan**
iv) **Approval from Telecom Deptt.**
v) **Details of machinery**
vi) **Date of establishment & Operation**
vii) **Details of pollution Control devices to control air and noise pollution and air noise monitoring report of day and night time.**
viii) **Consent/renewal fees as per the approved project report."**

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes

The petitioner-company was further apprised vide this communication that it has not sought the necessary clearance of the Board under the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Environment (Protection) Act, 1986 and for violating these provisions, the company was liable to be prosecuted.

It appears that the company had deposited a sum of Rs. 26,000/- for obtaining consent on 6th September, 1999. The company was directed to provide the adequate stack attachment to the DG exhaust vide communication dated 18.12.1999. The company had informed the Board about the necessary compliance of the directions issued on 18.12.1999 vide communication Annexure P-6. The Board had called upon the petitioner-company on 2nd March, 2000 to deposit fee of Rs. 20,180/- for consent/renewal. The company had deposited a sum of Rs. 20,180/- on 3rd March, 2000. The Board had granted NOC/consent to the petitioner-company for operation of cellular mobile telephone services in Shimla District valid upto 31st March, 2000 by way of communication dated 3.3.2000. The company was directed to apply for the renewal of consent for the year 2000-01 in the prescribed form within one month. The Board had directed the petitioner-company to apply for renewal of consent for the period 2000-01 vide letter dated 8.11.2000. The Board had issued letter to the company on 22nd September, 2001 to deposit a sum of Rs. 1,32,630/-. The Board had issued office order dated 28th December, 2001 bringing to its notice that the unit was directed to deposit the balance fees due and apply for consent of the State Board upto the year along with requisite annual licence fees before 9.1.2002. The company had deposited a sum of Rs. 4,92,362/- on 8.1.2002. The company had made a request to the Chairman of the Board for waiver of penalty on 8th

January, 2002. The company had enclosed a cheque of Rs. 1,06,910/- towards payment of fees. The Board had directed the company on 7th May, 2002 to deposit penalty fee i.e. Rs. 35,900/- and apply for renewal of consent for the current year.

Mr. B.C. Negi, Advocate appearing on behalf of the petitioner-company had strenuously argued that the company is a non-polluting unit and is not required to get consent under the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Environment (Protection) Act, 1986 and also the Hazardous Wastes (Management and Handling) Rules, 1989.

Mr. A.K. Bansal, Advocate appearing on behalf of the respondent-Board had submitted that the petitioner-company is required to get the consent for carrying out its operations as per the Acts mentioned above.

I have heard the parties and perused the record.

The Parliament has enacted an Act called 'Water (Prevention and Control of Pollution) Act, 1974'. Section 25 of the Act ibid imposes restrictions on new outlets and new discharges without the consent of the Board. The expression 'outlet', 'sewage effluent', 'sewer' and 'trade affluent' have been defined under section 2 of the Water (Prevention and Control of Pollution) Act, 1974.

Mr. B. C. Negi, Advocate had submitted that the operation of the unit is not resulting in any sewage effluent and sewer as defined under section 2 of the Water (Prevention and Control of Pollution) Act, 1974 and is not required to get the consent under the Act. Mr. A.K. Bansal, Advocate was not in a position to point out that the operation carried out by the petitioner-company is in violation of the Water (Prevention and Control of Pollution) Act, 1974 except referring to the averments contained

in para 1 of the reply filed by the Board. The averments contained in this para 1 of the reply are reproduced as under:

> **"The petitioner also comes under the ambit of Water (Prevention and Control of pollution) Act, 1974 as this unit generates effluent in the form of sewage/ sullage etc. Only those units are exempted from the provisions of Water (Prevention and Control of pollution) Act, 1974 by this State Board where the manpower employed is less than 20 persons and there is no use of fuel, as per the notification enclosed as Annexure R-1/4."**

The notification dated 5.12.1995 is not attracted in the present case at all since it provides exemption to the units who employed less than 20 persons. The Board is to see whether the operation of the unit generates any pollution as explained in the Water (Prevention and Control of Pollution) Act, 1974. If there is no discharge of any affluent of sewage, the Water (Prevention and Control of Pollution) Act, 1974 will not apply.

Now, this Court has to see: Whether the generators installed by the company are covered under the Air (Prevention and Control of pollution) Act, 1981 or not? It is stipulated under section 21 of the Air (Prevention and Control of pollution) Act, 1981 that no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area. The relevant entry for generators is 88 and 95 of Schedule-1 framed under rule 3 of the Environment (Protection) Rules, 1986. Section 15 of the Environment (Protection) Act, 1986 provides for the penalty for breach of the Act, Rules, orders and directions. Since the petitioner had installed generators it was required to get the consent from the respondent-Board under the Air (Prevention and Control of Pollution) Act, 1981.

This Court is also required to go into the question: Whether the provisions of the Hazardous Wastes (Management and Handling) Rules,

1989 could be made applicable to the petitioner-company or not? Initially item No. 44 of Schedule 1 (list of processes generating hazardous wastes) was attracted. Item No.44 laid down that every action relating to and every use of lubricating and system oil will result in hazardous waste in the shape of spent oil and other spent lubricating and system oil production. An amendment has been carried out in the Schedule 1 on 20th May, 2003 whereby the item No.5 will be attracted against industrial operations using minerals/synthetic oil as lubricant in hydraulic systems or other applications resulting in hazardous wastes i.e. used/spent oil. The petitioner-company had installed generators and for their proper maintenance lubricants are to be applied which definitely will result in production of hazardous waste i.e. used/spent oil.

Mr. B.C. Negi, Advocate had also contended that the imposition of penalty on the basis of notification dated 30th December, 1998 is not permissible. He had further contended that the penalty can only be imposed if the same is levyable under the enacted law.

Mr. A.K. Bansal, Advocate in reply has submitted that the basis for imposition of penalty is to check the tendency of the units to apply for renewal of consent after the date prescribed. Though the object of imposition of penalty may be laudable, but there is no legal sanctity behind the same. The penalty can only be levied if it is prescribed under the enacted law. The same could not be levied merely by issuing notification dated 30.12.1998 on the basis of the decision of the Board of Directors.

The Apex Court has held in ***M/s Khemka & Co. (Agencies) Pvt. Ltd. Versus State of Maharashtra***, (1975) 2 SCC 22 as under:

> **"The contention on behalf of the assessee is that there is no provision in the Central Act for imposition of penalty for delay or default in payment of tax, and, therefore, imposition of**

**penalty under the provisions of the State Act for delay or default in payment of tax is illegal.**

**Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to Section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers v. Union of India said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.**

**For the foregoing reasons we are of opinion that the provisions in the State Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act. There is no lack of sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax would be subjected to recovery proceedings under the Public Demands Recovery Act. A penalty is statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties. These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self contained code which by charging section creates liability for tax ad which by other sections creates a liability for penalty and imposes penalty. Section 9 (2) of the Central Act creates the State authorities as agencies to carry out the assessment, re-assessment, collection and enforcement of tax and penalty payable by a dealer under the Act."**

Further the Apex Court in ***State of Bihar and others Versus Industrial Corporation (P) Ltd. and others*** (2003) 11 SCC 465 has held as under:

> **"The statutory authorities must act within the four corners of a statute. They could take recourse to the proceeding for levy of penalty and the recovery thereof from the respondents only in the event there existed any agreement or statutory provision therefor. Such a power did not vest in the Commissioner of Excise or the Superintendents of Excise who had issued the impugned demand notice."**

Again the Apex Court has held in ***Collector of Central Excise, Ahmedabad Versus Orient Fabrics (P) Ltd.*** (2004 1 SCC 597 as under:

> **"A perusal of the said provision shows that the breach of the provision of the Act has not been made penal or an offence and no power has been given to confiscate the goods. It only provides for application of the procedural provisions of the Central Excises and Salt Act, 1994 and the Rules made thereunder. It is no longer res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific and explicit and expressly provided. The Act created liability for additional duty for excise, but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law."**

The upshot of the above discussion is that:

i) **the petitioner-company is not liable to seek consent under the Water (Prevention and Control of Pollution) Act 1974;**

ii) **the petitioner-company is required to seek consent under the Air (Prevention and Control of Pollution) Act, 1981 and the Rules framed thereunder; and**

iii) **Item No. 5 of Schedule 1 to the Hazardous Wastes (Management and Handling) Rules, 1989 will be applicable to the petitioner-company.**

iv) **the Board had no authority to levy the penalty on the basis of the notification dated 30th December, 1998.**

Accordingly the writ petition is partly allowed with the following directions:

a) **The Board will not insist for the consent under the Water ((Prevention and Control of Pollution) Act 1974. The petitioner will seek consent for its operation under the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986; and the Hazardous Wastes (Management and Handling) Rules, 1989.**

b) **The Annexures R-1/7 dated 30th December, 1998 is quashed and set aside and Annexure P-12 is quashed and set aside to the extent whereby the penalty from April, 2000 to August, 2001 was demanded from the petitioner- company.**

There shall be no order as to costs.

**( Rajiv Sharma), Judge**

June 26, 2007
**Awasthi**